Edmund Ming Kwan @ Kwaun Yee Ming, Edmund v Extra Excel (Malaysia) Sdn Bhd & Ors (Part 2)

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D1–26–56 OF 2004
VINCENT NG J
12 JUNE 2007

Civil Procedure — Contempt of court — Order of committal, application for — Intent to obstruct or frustrate the administration of justice — Whether proof beyond reasonable doubt required

Civil Procedure — Contempt of court — Order of committal, application for — Whether the statement was intended to be false and misleading — Whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice

The petitioner filed a petition under s 181 of the Companies Act 1965. The petitioner then filed an application for leave to make an application for an order of committal for contempt of court against the second and fourth respondents on the grounds that the second respondent had willfully and intentionally made false and misleading statements in his affidavits and against the fourth respondent for affirming an affidavit wherein he adopts the contents of the second respondent's affidavits and for authorizing the second respondent to affirm certain affidavits. Leave was granted by the court on 15 March 2006. Soon thereafter the petitioner made an application under O 38 r 2(3) of the Rules of the High Court 1980 and/or under the inherent powers of the court for leave to cross-examine the second and fourth respondents on all the related affidavits. This application to cross-examine was dismissed with costs on 14 March 2007. The court then heard the application to cite the second and fourth respondents for contempt of court

Held, dismissing the application:

(1) It is trite law that due to the quasi criminal nature of the contempt proceedings now before me, a heavy onus rests with the petitioner to prove his case beyond reasonable doubt. The said respondents have a legal right not to submit themselves to cross-examination. The said respondents' refusal for cross-examination should not be taken against them through the contents of their affidavits being disregarded or any adverse inference drawn against them on the question of weight to be attached to the said respondents' affidavits (see para 2).

(2) On the question whether the statement was intended to be false and misleading (mens rea) and whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice, the court would have to: (i) firstly, look at the relationship between the alleged false statements and the issues to be decided in the main proceedings; (ii) secondly, bear in mind that unlike the offence of perjury, contempt requires the actual or inevitable intent or consequence of frustrating or obstructing the administration of justice; (iii) thirdly, be mindful that a 'mere falsity of evidence is not enough to justify a contempt charge'; and, (iv) fourthly, be slow to draw inferences from affidavits as to the bona fides or mala fides of the alleged contemnor (see para 4).

(3) The said respondents have explained the reasons for not disclosing the 1995 distributorship agreement and the MSA in paras 13 to 16 of encl 182A. The said respondents says that the 1995 distributorship agreement was not disclosed because it had been superseded by the MSA and was no longer relevant and that MSA was not disclosed because they are bound by a confidentiality clause in the MSA. The non-disclosure does not amount to a contempt of court as the petitioner has not proved beyond reasonable doubt that the said respondents by their non-disclosure had intended to or did in fact pervert the administration of justice (see para 5).

(4) Exception to the rule against hearsay applies to interlocutory proceedings where prima facie evidence are often admissible because these matters are often brought up as a matter of urgency. However, where proceedings are final, they are not urgent matters and the court must act on more cogent evidence and apply the ordinary rule of evidence. This exception to the rule against hearsay evidence is strictly confined to affidavit evidence for use in interlocutory proceedings which by their very nature would have to be dealt with urgently and on interim rather than final basis. Thus, O 41 r 5(2) RHC is inapplicable to cases of criminal contempt, and the Utah Court transcripts are inadmissible under this provision (see para 15).

(5) The fourth respondent could not be in contempt of court for affirming encl 28 and adopting the statements made by Hendrik in encl 14. The fourth respondent cannot be held in contempt of court because there is nothing in encl 28 that is patently false or misleading or upon which the court could find that he had intended to obstruct or frustrate the administration of justice. By the same token, the fourth respondent cannot be in contempt of court for merely authorising Hendrik to affirm affidavits on his behalf. Notably, the fourth respondent did not affirm the alleged false statements in encls 127 & 147 (see para 18).

[Bahasa Malaysia summary

Pempetisyen telah memfailkan petisyen ini di bawah s 181 Akta Syarikat 1965. Pempetisyen kemudiannya memfailkan satu permohonan untuk kebenaran membuat permohonan untuk satu perintah komital kerana menghina mahkamah terhadap responden kedua dan keempat atas alasan bahawa responden kedua telah secara sukarela dan dengan niat membuat pernyataan palsu dan mengelirukan dalam

afidavitnya dan terhadap responden kedua kerana mengikrarkan afidavit yang di dalamnya beliau telah mengambil isi kandungan afidavit responden kedua dan membenarkan responden kedua mengikrarkan afidavit-afidavit tertentu. Kebenaran telah diberikan oleh mahkamah pada 15 Mac 2006. Tidak lama kemudian pempetisyen telah membuat permohonan di bawah A 38 k 2(3) Kaedah-kaedah Mahkamah Tinggi 1980 dan/atau di bawah kuasa-kuasa sedia ada untuk kebenaran pemeriksaan balas responden kedua dan keempat ke atas afidavit-afidavit yang berkaitan. Permohonan untuk pemeriksaan balas telah ditolak dengan kos pada 14 Mac 2007. Mahkamah kemudiannya mendengar permohonan untuk mensabitkan responden kedua dan keempat kerana menghina mahkamah.

Diputuskan, menolak permohonan:

(1) Ia adalah undang-undang lazim bahawa disebabkan sifat kuasi jenayah prosiding penghinaan sekarang di hadapan saya, beban yang berat terletak pada pempetisyen untuk membuktikan kesnya melampaui keraguan yang munasabah. Responden-responden tersebut mempunyai hak-hak perundangan untuk tidak menyebabkan diri mereka diperiksa balas. Keengganan responden-responden tersebut kepada pemeriksaan balas tidak boleh diambil daripada mereka melalui kandungan-kandungan afidavit-afidavit yang telah diabaikan atau membuat sebarang kesimpulan berlawanan terhadap mereka atas persoalan pertimbangan yang akan diletakkan kepada afidavit-afidavit responden tersebut (lihat perenggan 2).

(2) Kepada persoalan sama ada kenyataan diniatkan sebagai palsu dan mengelirukan (mens rea) dan sama ada ia dibuat dengan niat sebenar dan tidak dapat dielakkan atau kesan daripada kekecewaan atau menghalang pentadbiran keadilan, mahkamah hendaklah: (i) pertama, melihat hubungan di antara dakwaan kenyataan palsu dan isu-isu yang perlu diputuskan dalam prosiding utama; (ii) kedua, hendaklah diingat bahawa tidak seperti kesalahan sumpah-bohong, penghinaan memerlukan niat sebenar dan tidak dapat dielakkan atau kesan kekecewaan atau menghalang pentadbiran keadilan; (iii) ketiga, harus diingat bahawa 'pemalsuan keterangan semata-mata tidak mencukupi untuk memberikan pertuduhan penghinaan'; dan, (iv) keempat, secara perlahan untuk membuat kesimpulan daripada afidavit-afidavit berkenaan bona fide atau mala fide ke atas penghinaan yang didakwa (lihat perenggan 4).

(3) Responden-responden tersebut telah menerangkan sebab-sebab kerana tidak mendedahkan perjanjian pengedar 1995 dan MSA pada perenggan 13 hingga 16 lampiran 182A. Responden-responden tersebut mengatakan bahawa perjanjian pengedar 1995 tidak dapat didedahkan kerana ia telah digantikan dengan MSA dan tidak lagi relevan dan bahawa MSA tidak didedahkan kerana mereka terikat dengan klausa kerahsiaan dalam MSA. Ketiadaan pendedahan tidak membawa kepada penghinaan mahkamah kerana pempetisyen tidak membuktikan melampaui keraguan munasabah bahawa responden-responden tersebut oleh kerana tiada pendedahan telah meniatkan kepada atau sebenarnya mencabul pentadbiran keadilan (lihat perenggan 5).

(4) Pengecualian kepada peraturan dengar cakap terpakai kepada prosiding-prosiding interlokutori bila keterangan prima facie selalunya boleh diterima kerana perkara-perkara ini selalu dibawa kerana sebab-sebab keperluan yang mendesak. Walau bagaimanapun, bila prosiding-prosiding sudah ditentukan, ia bukanlah perkara yang perlu disegerakan dan mahkamah mestilah bertindak ke atas keterangan yang jelas dan menggunapakai kaedah keterangan yang biasa. Pengecualian kepada kaedah dengar cakap ini adalah secara ketatnya dihadkan kepada keterangan afidavit untuk kegunaan dalam prosiding interlokutori yang mana dengan sifatnya akan diuruskan dengan segera dan untuk sementara dan bukannya sebab ditentukan. Oleh itu, A 41 k 5(2) KMT adalah tidak terpakai kepada kes-kes penghinaan jenayah, dan transkrip Mahkamah Utah adalah tidak boleh diterima di bawah peruntukan ini (lihat perenggan 15).

(5) Responden keempat tidak boleh dikenakan menghina mahkamah kerana mengikrarkan lampiran 28 dan menggunakan kenyataan-kenyataan yang dibuat oleh Hendrik dalam lampiran 14. Responden keempat tidak boleh diputuskan sebagai menghina mahkamah kerana tidak ada dalam lampiran 28 bahawa ia adalah salah dan mengelirukan atau setelah mahkamah mendapati bahawa beliau berniat untuk menghalang atau mengecewakan pentadbiran keadilan. Dengan sebab yang sama, responden keempat tidak boleh dikatakan menghina mahkamah kerana semata-mata membenarkan Hendrik untuk mengikrarkan afidavit-afidavit bagi pihaknya. Terutamanya, responden keempat tidak mengikrarkan kenyataan palsu yang didakwa dalam lampiran 127 & 147 (lihat perenggan 18).]

Notes

For cases on order of committal, application for, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1822–1840.

Cases referred to

Aqua-Leisure Industries Inc [2001] HKCU 1189 (refd)
Bride, Ex-parte Steward, Re [1984] WB 455 (refd)
CRC-Evans Pipeline [2001] ACWSJ-675607 (refd)
Comet Products UK Ltd v Hawkex Plastics Ltd And Another [1971] 2 QB 67 (refd)
Coward v Stapleton [1953] 90 CLR 573 (refd)
Jaginder Singh & Ors v Attorney-General [1983] 1 MLJ 71 (refd)
Keeley v Brooking [1979] 25 ALR 45 (refd)
R v Christopher Charles Murfett [2004] VSC 160 (refd)
R v Shokoya [1992] The Times, June 10 (refd)
Savings & Investment Bank Ltd [1988] 1 All ER 975 (refd)
Science Research Council [1980] AC 1028 (refd)
Smith and Fawcett Ltd, Re [1942] Ch 304 (refd)
Wallace Smith Trust Co Ltd [1996] 4 All ER 403 (refd)
Yee Sang Metal [2002] HKCU 1255 (refd)

Legislation referred to

Companies Act, 1965 s 181
Evidence Act 1950 ss 74, 78(1)(f), 86

Rules of the High Court 1980 O 29 r 5, O 38 r 2(3), O 41 r 5(2), O 88 r 7(3)

Logan B Sabapathy (PY Liew and LH Wong with him) (Logan Sabapathy & Co) for the petitioner.

Mah Weng Kwai (NS Guok and Mr Raymond Mah with him) (Mah Weng Kwai & Associates) for the respondents.

Vincent Ng J:

[1] Now for determination is the petitioner's application under encl 178 to cite the second and fourth respondents (said respondents) for contempt of court due to allegedly false statements in certain affidavits, which I shall hereafter elaborate.

[2] Before I consider the factual merits of this application it is appropriate to bear in mind the following principles of law. It is trite law that due to the quasi criminal nature of the contempt proceedings now before me, a heavy onus now rests with the petitioner to prove his case beyond reasonable doubt. The said respondents have a legal right (as I have earlier ruled in respect of encl 186) not to submit themselves to cross-examination. Considering that one of the reasons underpinning the ratio in Comet Products is that the application for leave to cross-examine could be for a collateral purpose or could lead to a pre-trial fishing expedition, I hold that the said respondents refusal for cross-examination should not be taken against them through the contents of their affidavits being disregarded or any adverse inference drawn against them on the question of weight to be attached to the said respondents' affidavits in determining encl 178. Thus, the particular passage (at p 75) in *Comet Products UK Ltd* [1971] 2 QB 67 relied on by the petitioner is clearly obiter dictum and should not be applicable in determining a citation for contempt where a criminal standard of proof has to be applied. The passage reads: 'Seeing, however, that cross-examination is not to be allowed, it means that the judge might think it right to disregard the affidavit, or to give it very little weight'.

[3] Of the three ingredients that the Petitioner must prove, the two most vital ingredients, besides actus reus, are mens rea and whether the actus reus was committed with the actual or inevitable intention of frustrating or obstructing the administration of justice. For consideration are the petitioner's three complaints that: (i) the second respondent admitted to the existence of the 1995 agreement and the master settlement agreement ('MSA') 'only after it was uncovered by the petitioner'; (ii) there were 'inconsistencies made by the second respondent as to the shareholding of Chen J–F (third respondent)' in his affidavits as compared to his testimony in the Utah Court transcripts; and (iii) the uncovering of the 1995 agreement also indicates that the said respondents had made 'false and misleading statements as to the allegation of diversion of business opportunity to Extra Excellence Manufacturing (Singapore) Pte Ltd'.

[4] On the question whether the statement was intended to be false and misleading (mens rea) and whether it was made with actual or inevitable intent or consequence

of frustrating or obstructing the administration of justice, this court would have to: (i) firstly, look at the relationship between the alleged false statements and the issues to be decided in the main proceedings (see *Keeley v Brooking* [1979] 25 ALR 45); (ii) secondly, bear in mind that unlike the offence of perjury, contempt requires the actual or inevitable intent or consequence of frustrating or obstructing the administration of justice (see *Jaginder Singh & Ors v Attorney-General* [1983] 1 MLJ 71, *Coward v Stapleton* [1953] 90 CLR 573, *Re Bride, Ex-parte Steward* [1984] WB 455, *R v Christopher Charles Murfett* [2004] VSC 160 and *Halsburys Laws of England*, 4th Ed Vol 9(1) pp 242 – 243); (iii) thirdly, be mindful that a 'mere falsity of evidence is not enough to justify a contempt charge' (see *Yee Sang Metal* [2002] HKCU 1255); and, (iv) fourthly, be slow to draw inferences from affidavits as to the bona fides or mala fides of the alleged contemnor (see in *Re Smith and Fawcett Ltd* [1942] Ch 304).

RE COMPLAINT NO (I) (NON-DISCLOSURE)

[5] The said respondents have explained the reasons for not disclosing the 1995 distributorship agreement and the MSA in paras 13 to 16 of encl 182A. The said respondents says that the 1995 distributorship agreement was not disclosed because it had been superseded by the MSA and was no longer relevant and that MSA was not disclosed because they are bound by a confidentiality clause in the MSA. I am of the view that the non-disclosure does not amount to a contempt of court as the petitioner has not proved beyond reasonable doubt that the said respondents by their non-disclosure had intended to or did in fact pervert the administration of justice. The Petitioner has himself conceded that there was no such intention, when he submitted through his counsel that the said respondents were 'ill-advised and confused about the principles of disclosure …'. In addition, the Petitioner's reference to the cases of *Wallace Smith Trust Co Ltd* [1996] 4 All ER 403 and *Science Research Council* [1980] AC 1028 demonstrates clearly that the issue of disclosure is one which ought to be decided at the hearing of the petitioner's discovery applications. It is unfortunate that the petitioner did not wait for the outcome of the discovery applications before filing this committal application.

[6] I find the petitioner's submission concerning an agreement dated 15 February 1993 to be misconceived, as the said respondents did not produce any agreement dated 15 February 1993, and exh HT–2 which is dated 15 February 1993 is a letter of termination. The petitioner in para 16 of encl 5A had alleged that the first respondent had at all times exclusive distributorship rights over Singapore pursuant to the 1991 agreement annexed as exh EKM-5. In response, the said respondents annexed exh HT-2 encl 14 to show that the 1991 agreement had been terminated. Based on the above and the explanations and clarifications provided in encl 182A, which is plausible to this court, I am unable to find that the said respondents had actual or inevitable intentions of frustrating the administration of justice with their statement,. Further, the petitioner is deemed to have admitted the said respondents' explanations as the petitioner had omitted to file an affidavit in reply.

RE COMPLAINT NO (II) CONCERNING THE BENEFICIAL OWNERSHIP OF CHEN J-F'S SHARES

Whether the issue of beneficial ownership is relevant to the issues to be decided in the main proceedings

[7] I find the issue of the beneficial ownership of Chen J–F's shares in 1996 and 2000 to be wholly irrelevant to the re-amended petition. The pertinent issue to be decided is whether or not the share allotments in 1996 and 2000 were reasonable, commercially justifiable and in the best interest of the first respondent. Obviously, the said respondents' reference to the 'ownership' of shares means 'registered ownership' and as is reported to the Registrar of Companies. Indeed, the 'beneficial ownership' of the shares in the first respondent was never an issue until it was raised by the petitioner.

Whether the Utah Court transcripts are admissible

[8] The petitioner's allegations of false statements on the Chen J–F's shareholdings are based upon a comparison between the Utah Court transcripts and Hendrik's affidavits [encls 13, 127 & 147]. The said respondents' contention is that the Utah Court transcripts exhibited in encls 143,159 and 165 ('Utah Court transcripts') are inadmissible for the purpose of the contempt proceedings since the transcripts are 'documentary hearsay evidence'. To counter the said respondents' contention counsel for the petitioner says that the court transcripts are 'documentary evidence' and reliance is placed on the contents of such documents. I think that the said respondents' objection on the Utah Court transcripts could have been and should be divided into two limbs for greater clarity. The first limb being that the Utah Court transcripts are inadmissible and should not be read as they are exhibited in breach of ss 74, 78(1)(f) and 86 of the Evidence Act 1950. The second limb being that even should they be read as part of the petitioner's affidavits, the Utah Court exhibits should not be 'used', for being heresay evidence, which could only be used for the restrictive purpose specified in O 41 r 5(2) of the Rules of the High Court 1980 ('RHC').

[9] On the first limb of the objections I would now have to examine whether this alleged 'documentary evidence' has been tendered pursuant to the Evidence Act 1950. The relevant provisions are ss 74, 78(f) and 86 which state as follows:

> 74. Public documents
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> The following documents are *public documents*:
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> (a) *documents forming the acts or record of the acts of —*
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> (i) the sovereign authority;
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> (ii) official bodies and tribunals; and
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> (iii) *public officers, legislative, judicial and executive*, [whether Federal or State or of any other part of the Commonwealth] *or of a foreign country; and*

A (b) public record, kept in [Malaysia] of private documents.

78. *Proof of certain official documents*

(1) The following *public documents* may be proved as follows:

B (f) Public documents of any other class in a *foreign country* – by the original or by a *copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.*

86. Presumption as to certified copies of foreign judicial records

C The court *may presume* that any document purporting to be a certified copy of any judicial record of any country not [being a part of the Commonwealth] *is genuine and accurate* if the document purports to be *certified in any manner which is certified by any representative of the Yang di-Pertuan Agong in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.*

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[10] After a careful study of the above set out three provisions, I hold that a public document, which includes judicial records 'of a foreign country' as defined in s 74 of the Evidence Act may be proved (other than by its original copy) under s 78 if the following three conditions are met, namely: (i) the copy is certified by the lawful E keeper thereof; (ii) coupled with a certificate under the seal of the notary public or of a consular officer of Malaysia that the copy is duly certified by the officer as having the lawful custody of the original copy; and (iii) the character of the document is proved according to the law of the foreign country concerned. The other mode in which judicial records could be proved is by virtue of s 86 above, where the court may F presume the contents of such records to be genuine and accurate if the document of any country (not being a part of the commonwealth) is: (i) certified in any manner; and (ii) which is in turn certified by any representative of the Yang di-Pertuan Agung in or for such country to be the manner commonly in use in that country for certification of copies of judicial records.

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[11] After having carefully examined all the Utah Court transcripts exhibited in the petitioner's affidavits, encls 143, 159 and 165, I find that none of the exhibits have been duly certified as true copies and that they are all Xerox copies which are in fact quite blur. The petitioner has not produced any certification from the Utah Court or H its officers having lawful custody of the original copies of the Utah Court transcripts that they are true copies. As the present application is criminal in nature, strict compliance with the evidentiary rules is required before such evidence can be admitted and used against the said respondents. In criminal proceedings or even civil proceedings, hearsay evidence may only be admitted if the exceptions under ss 74, I 78(f) and 86 of the Evidence Act 1950 are met. However, the petitioner has made no effort to satisfy the admissibility requirements of the Evidence Act 1950. This court may not presume the Utah Court transcripts to be genuine or accurate as they are not duly certified as true copies. Further, the petitioner has not produced any affidavits from the Utah Court or its officers asserting the genuineness and accuracy of the Utah Court transcripts.

[12] Thus, I hold that the petitioner has not satisfied the statutory requirement for admissibility of the Utah Court transcripts — they are inadmissible as part of a judicial record and should not be read. And, that even should they be considered as part of the said affidavits, I further hold that the Utah Court exhibits should not be used as they are inadmissible for being hearsay evidence which is wholly precluded in contempt proceedings — a fortiori, in proceedings which are criminal in nature such as the instant case. Since I have held that the Utah Court transcripts have not been tendered in accordance with the Evidence Act it could constitute, at most, hearsay evidence.

[13] Order 41 r 5(2) of the RHC reads as follows:

> 5(2) An affidavit sworn *for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.*

[14] This special provision provides for an exception to the rule against hearsay evidence where an affidavit for use in interlocutory proceedings may contain hearsay evidence. However, this application to commit the said respondents for false and misleading statements is not an 'interlocutory proceeding'. Further, the purpose of the committal application is final, wholly punitive and not merely to seek an interlocutory order to maintain the status quo. Hearsay affidavit evidence are of lower quality as evidence and have less probative value than ordinary non-hearsay evidence and should not be admissible in evidence. I am completely ad idem with, and I adopt the following dicta in *Aqua-Leisure Industries Inc* [2001] HKCU 1189 (High Court of Hong Kong):

> The effect of my ruling that the present proceeding are final proceeding does not mean affidavit evidence may not be used at all. O 41 r 5(2) provides: 'An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.' The effect of this rule is that where affidavits are used in interlocutory proceedings, they may contain statements of information or beliefs. Such statements of information or beliefs are of a lower quality as evidence and have less probative value than ordinary hearsay evidence and but for this rule (O 41 r 5(2) of the Hong Kong Rules which are in pari materia with our O 41 r 5(2) of RHC) would not have been admissible in evidence. For the purpose of interlocutory proceeding, there are good grounds for the court to act on such information or beliefs. This is because interlocutory proceeding are often brought up as a matter of urgency to enforce an order, ancillary to the main proceedings, seeking to preserve the status quo pending final determination, or to regulate the conduct of litigation, or to regulate the conduct of the parties pending trial, lest a party would suffer irreparable damage. Breach of such an order may create extreme urgencies, for example, the need to promptly restore the status quo, which if upset would cause irreparable damage to a party; the need to preserve evidence, which if destroyed would result in prejudice to a party; the need to preserve assets, which if dissipated would render any future judgment nugatory. The urgency of the situation may not permit the parties to obtain evidence from witness who may be unwilling or unavailable for whatever reason. Under such circumstances, there is a compelling need for the court to act on this kind of evidence of a lower quality at the risk of otherwise incurring greater injustice to the innocent parties. However, where the proceedings are final, such urgencies are removed. The court must act on more cogent evidence and apply the ordinary rule of evidence. This does not mean affidavit evidence may not be used at all in final proceedings. What is excluded in final

A proceedings is evidence of the lower quality such as information or beliefs. Thus in final proceedings, affidavit evidence may still be used subject to the rules and practices of the court.

B **[15]** Exception to the rule against hearsay applies to interlocutory proceedings where prima facie evidence are often admissible because these matters are often brought up as a matter of urgency. However, where proceedings are final, they are not urgent matters and the court must act on more cogent evidence and apply the ordinary rule of evidence. See also, *CRC-Evans Pipeline* [2001] ACWSJ-675607 (Alberta Queens Bench, Canada). Notably, both Aqua-Leisure and CRC-Evans C Pipeline cases concern contempt proceedings. Clearly in my view, this exception to the rule against hearsay evidence, is strictly confined to affidavit evidence for use in interlocutory proceedings which by their very nature would have to be dealt with urgently and on interim rather than final basis. Thus, I hold that O 41 r 5(2) of the RHC is inapplicable to cases of criminal contempt, and the Utah Court transcripts D are inadmissible under this provision. See also *R v Shokoya* [1992] The Times, June 10, CA (Court of Appeal, UK). In *CRC-Evans Pipeline*, Justice Allan H Wachowich had this to say:

> While the English Court of Appeal has indicated that hearsay evidence is admissible on a contempt application, our Court of Appeal has ruled otherwise. In *Kulyk v Wigmore* [1987] E 53 Alta LR (2d) 44 (CA), the defendant's statement of defence was struck out by the Chambers judge as a sanction for defendant's contempt in failing to appear for an examination for discovery. The *affidavit in support of the application contained hearsay evidence*. In delivering the unanimous judgement of the court, Kerans JA said at p.45:
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> > F The order was made as a consequence of a finding of contempt of court. *We are the view that a Court should proceed very prudently when asked to cite for contempt of court*. As we have already indicated in earlier cases, personal service should be required. *Moreover, the motion should be considered as a final order (and not an interlocutory order) and should not be based upon hearsay evidence*. For these two reasons, we think that the learned Queen's Bench judge erred in the exercise of his discretion.
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> G In *Letal v Lakeland Roman Catholic Separate School District No 150* [2000] 276 AR 130 at para 17, Verville J acknowledged that: '…*a motion for contempt should be considered as a final order (and not an interlocutory order) and that hearsay evidence must be ignored*,' referring to *Kulyk v Wigmore* in support of this contention.
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> H Fraser CJA., for a unanimous court in *Litterst v Horrey* [1995] 178 AR 216 (CA), also accepted that *hearsay evidence ordinarily is inadmissible on a contempt application*.
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> In criminal proceedings hearsay evidence may be admitted if the criteria of reliability and necessity are met (*R v Khan* [1990] 2 SCR 531; *R v Smith* [1992] 2 SCR 915 at 917; *R v Starr* [2000] 2 SCR 144). There is no evidence in the present case that the Applicant was I unable to obtain direct evidence of the alleged breach or even attempted to do so. Nor is there evidence which would establish the reliability of the hearsay evidence presented.
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> I am bound by the decision of our Court of Appeal in Kulyk. *However, even if hearsay evidence was admissible on an application for contempt, the affidavits in the present case would still be insufficient to convince me beyond a reasonable doubt that the Respondents are in contempt of my Order of July 31st.*

> The Applicant bears the onus of proof. As contempt proceedings are quasi-criminal, the criminal standard of proof applies – proof beyond a reasonable doubt (*Bhatnager v Canada Minister of Employment and Immigration,* [1990] 2 SCR 217 at paras 14 and 15). [Emphasis added]

(See also *Savings & Investment Bank Ltd* [1988] 1 All ER 975 at 990).

[16] The petitioner relies on paras 36, 83 and 100 of encl 14 and para 16(c) of encl 127 to allege that Hendrik made '… several false and misleading statements … stating that the shares transferred, subscribed, allotted or registered to Chen J–F were in fact truly and beneficially wholly owned by Chen J–F…' However, to me it is plainly apparent from those paragraphs that Hendrik did not make that alleged statement. And, that the alleged inconsistencies have been explained and clarified in further detail in paras 24 and 25 of encl 182A. Further, the petitioner is deemed to have admitted the respondents' explanations as the petitioner omitted to file any affidavit in reply. Based on the explanations and clarifications provided in encl 182A, it is evident to this court that the statements in question are not intended to mislead. Thus I find that Hendrik had no actual or inevitable intention of frustrating the administration of justice with his statements.

RE COMPLAINT NO (III) (DIVERSION OF BUSINESS OPPORTUNITY)

[17] On this aspect of the petitioner's complaint, it is pertinent to note that Hendrik's statement in para 109 of encl 14 was made in response to the petitioner's allegation of diversion of business opportunity in paras 109 to 112 of encl 5A. The petitioner alleged that the said respondents had allowed Extra Excellence (S) Pte Ltd ('EES') to act as a multi-level marketing ('MLM') distributor for E Excel International Inc USA ('EEUSA') at a time when the first respondent had the exclusive right to distribute products in Singapore. Hendrik replied in para 109 of encl 14 that: 'at all material times EEUSA had the exclusive authority to distribute health products of EEUSA in Singapore'. Obviously, the phrase 'at all material times' refers to the period of time when EES was operating as a MLM distributor for EEUSA. And, as explained in para 11.7 of encl 182A, EES did not begin trading as an MLM distributor until after the execution of the MSA on 29 May 2001. The business activities of EES prior to 29 May 2001 are also explained in para 11.6 of encl 182A, where it is pertinent to note that, it is asserted that these activities did not amount to a diversion of business or a breach of fiduciary duties as alleged by the petitioner. The petitioner is deemed to have admitted the said respondents' explanations as the petitioner has omitted to file any affidavit in reply. Based on the above and the explanations and clarifications provided in encl 182A, it is evident to this court that the statements in question are not meant to mislead the court, and least of all could I find beyond reasonable doubt that Hendrik had any actual or inevitable intention of frustrating the administration of justice with his statements.

Whether the fourth respondent had committed contempt

[18] I do not see how the fourth respondent ('Le') could be in contempt of court for affirming encl 28 and adopting the statements made by Hendrik in encl 14.

Le cannot be held in contempt of court because there is nothing in encl 28 that is patently false or misleading or upon which I could find that he had intended to obstruct or frustrate the administration of justice. By the same token, Le cannot be in contempt of court for merely authorising Hendrik to affirm affidavits on his behalf. Notably, Le did not affirm the alleged false statements in encl 127 & 147.

CONCLUSION

[19] In the event, for all the reasons and grounds above I find the petitioner has failed to prove beyond reasonable doubt that the said respondents had committed contempt. Considering the nature of the contempt proceedings and the pre-trial stage of the petition, only reasonable or plausible explanations, would need be proffered, which the said respondents had done. Also, in failing to counter such explanations the petitioner is deemed to have admitted and agreed to the said respondents' explanations. It would follow that even if the explanations offered by the said respondents are found to be not satisfactory to the petitioner, there is no reason why the said respondents should be committed for contempt as they are, in law, clearly entitled to a reasonable benefit of doubt.

[20] The petitioner's application for orders of committal in encl 178 must be and is dismissed with costs to the said respondents in any event. He is condemned in such costs for having instituted the wholly unnecessary, unusual and extraordinary contempt proceedings which has caused a delay in the disposal of the main purpose of the petition.

[21] I shall also have to deal with the petitioner's application under summons-in-chambers dated 4 April 2007 (encl 199) for early trial of encl 1. Only brief grounds are necessary for my decision. The crux of the said respondents' objections to early trial could be gleaned from the written submissions of their counsel who has said (in para 2 of encl 200B) that: 'While the respondents have no objections to the early disposal of the petition, we respectfully submit that disposal of the petition must properly accord with rules of procedure and the judicial exercise of the court's discretion.', and (in para 18 of encl 195) that '… the petitioner should withdraw his outstanding interlocutory applications before he is entitled to an early trial of the petition'.

[22] In regard to the assertion of non-observance of rules of procedure, it must be noted that the petitioner has, since his earlier application by way of letters dated 27 November 2006 and 9 March 2007 (encls 187A and 194) addressed to this court, filed a summons-in-chambers (encl 199), to formally apply for an early trial of encl 1. As to the objections about there being no affidavit filed in support of encl 199, I do not think that in this particular application such affidavit is necessary, as the petitioner has referred to the several existing affidavits already filed in court to support his plea for an early trial. In any event, this court is clothed with a wide discretion, in appropriate circumstances, to make such an order in a summons for directions under O 88 r 7(3) read with O 29 r 5 of the RHC. Notably, in the instant case the petitioner has taken out a summons for direction dated 6 October 2004 (encl 5).

[23] Considering that: (i) the petitioner has now agreed that encls 10, 131, 145, 164 and 171 (see p 2 of encl 199) 'be stood over to trial of the petition' in encl 1; (ii) there are serious allegations, in the several affidavits hitherto filed by him, concerning the depletion of the company assets, etc., which would warrant an early trial since the Petitioner has now agreed inter alia that encl 10 for the appointment of receivers and managers as independent interim caretakers of the first respondent's company 'be stood over to trial of the petition'; (iii) it is in the interest of all parties herein and to save the court's time in terms of multiple and separate hearings, probable appeals and costs on encls 10, 121, 145, 164 and 171; (iv) there is sufficient material in all the affidavits filed by both sides for this court to make its decision; and, (v) the said respondents themselves do not appear to have serious objections to an early trial, save for an implicit suggestion for a trade-off which requires the petitioner to abandon certain of his other enclosures, this court should, in the circumstances of this case, exercise its discretion in favour of the petitioner. In the event his application in encl 199 in terms of the prayers (1) and (2) is allowed costs on encl 199 and all those enclosures that are now stood over to trial is reserved to be dealt with by the trial judge. I shall now proceed to fix the earliest available dates for trial of encl 1.

Application dismissed.

Reported by Brendan Navin Siva